Supreme Court, U.S.
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No. 95-2040

In The

Supreme Court of the United States

October Term, 1995

TSENG FU LIN, d/b/a ORIENTAL JADE RESTAURANT,

Petitioner,

v.

CITY OF GOLDSBORO, FLOYD McKEEL, and CHARLES R. SOUTHERLAND,

Respondents.

On Petition For A Writ Of Certiorari To The North Carolina Court Of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the North Carolina Court of Appeals erred in affirming the North Carolina Superior Court's grant of summary judgment for Respondents?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the petition for a writ of certiorari seeking review of the decision of the North Carolina Court of Appeals in this case. (Discretionary review denied by the North Carolina Supreme Court.)

STATEMENT OF THE CASE[1]

The Petitioner is the owner of a restaurant at 2102 North 117 Bypass, Goldsboro, North Carolina, entitled the Oriental Jade Restaurant. On September 20, 1991 and March 24, 1993, the City maintenance crews cleaned out a large section of sanitary sewer pipe where Petitioner's building connected to the City's sanitary sewer main. Said sanitary sewer main was clogged with grease and had contaminated the plumbing of citizens connected to the sewer further down-line. (Appendix p. 5). John Hales, Plumbing/Mechanical Inspector for the City of Goldsboro, determined that, because the Petitioner's restaurant was the first customer connected to the sanitary sewer main, the Petitioner's restaurant was the source of the grease blockage. (Appendix p. 5). By letter dated March 31, 1993, Mr. Hales notified the Petitioner that, because of the grease problem they had previously discussed, the Petitioner was required by Goldsboro City Ordinance §25-35 to install a grease trap of sufficient size and strength to protect the City's sanitary sewer main.

[1] Pursuant to Rule 24.2, Respondents tender this Statement of the Case to correct factual misstatements by Petitioner.

(Petitioner's Appendix p. 82). Mr. Hales verbally advised the Petitioner on numerous occasions between March 31, 1993, and December 15, 1993, that a grease interceptor, as required by the North Carolina State Plumbing Code, would have to be installed in the restaurant. (Appendix pp. 5-6).

Sometime after March 31, 1993, there was a fire at the Oriental Jade Restaurant. The restaurant closed for repairs to the building. Although the Petitioner was denied a water permit because he had failed to install the grease interceptor, he was granted a temporary water permit for the purpose of repairing the building. (Appendix p. 6).

By certified letter of December 3, 1993, Chief Building Inspector, Floyd McKeel, again notified the Petitioner that water service to the Petitioner's building would not be authorized on a permanent basis until such time as a grease interceptor was installed, pursuant to the North Carolina State Building Code and City Ordinance. (Petitioner's Appendix p. 85). Thereafter, Petitioner requested a variance from this requirement from the City of Goldsboro, which request was denied. (Petitioner's Appendix p. 18). The Petitioner failed to comply with the directives and notifications from the Respondents over an extended period of nine months and, as a result, the Petitioner was notified by certified letter dated December 15, 1993 that his permit to connect with City water was revoked effective December 16, 1993, pursuant to Goldsboro City Ordinance §25-35. (Petitioner's Appendix p. 90).

The Petitioner subsequently installed the grease interceptor, was granted a water permit, reopened his

business and was granted sewer service. (Appendix p. 16).

Petitioner filed a complaint on April 20, 1994 alleging that Respondents ordered the closing of Petitioner's business and shut off the utilities at his restaurant without providing Petitioner with notice or an opportunity to be heard. (Petitioner's Appendix p. 76). The Superior Court denied Petitioner's motion for a preliminary injunction directing the Respondents to provide utility service. (Petitioner's Appendix p. 34). After hearing the arguments of both parties, the North Carolina Superior Court, Honorable Russell Lanier presiding, granted Respondents' Motion for Summary Judgment on the ground that Respondents were protected from suit by governmental immunity. (Petitioner's Appendix p. 1, Respondents' Appendix p. 1).

On December 19, 1995, the North Carolina Court of Appeals affirmed the Superior Court's decision on the following grounds: 1) Respondents' actions were authorized by North Carolina statutory law, thereby permitting the application of governmental immunity by the Superior Court; 2) based on North Carolina case law, Petitioner had no property interest in the water service and, therefore, could not claim a violation of his due process rights; and 3) assuming arguendo that Petitioner did have a property interest in the water service, there was no infringement on his right to due process. (Petitioner's Appendix p. 61). The North Carolina Supreme Court denied Petitioner's request for discretionary review on February 8, 1996. (Petitioner's Appendix p. 59). Petitioner now asks this Court to review this decision.

In his Statement of Fact, Petitioner makes two allegations that have not been raised prior to this petition. Petitioner alleges that, after investigation, federal authorities declined to take any action against him because North Carolina authorities had already determined that Petitioner had "complied with the law by having a Grade A Report" (citing Petitioner's Appendix p. 15). Respondents have no knowledge of any investigation or allegations pursuant to the 'Clean Water Protection Law' and suggest that the report provided by Petitioner does not address compliance with the North Carolina Plumbing Code. Furthermore, contrary to Petitioner's statements, the letter of December 9, 1993 from North Carolina Governor James B. Hunt, Jr. (Petitioner's Appendix p. 16), does not indicate that the State decided not to prosecute Petitioner's violation of the North Carolina Plumbing Code. Rather, the letter requests further information from Petitioner in order that the Department of Insurance may render a decision. These allegations have not been previously addressed by the state courts nor has Petitioner introduced any evidence to support either allegation at neither the state trial court nor state appellate court.

ARGUMENT

THE NORTH CAROLINA COURT OF APPEALS HAS *NOT* DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH DECISIONS OF ANOTHER STATE COURT OF LAST RESORT OR THE UNITED STATES COURT OF APPEALS OR THE UNITED STATES SUPREME COURT

The Petitioner has failed to provide this Court with any decisions of another state court of last resort, the

United States Court of Appeals, or the United States Supreme Court which decide a federal question in a way contrary to the decision of the North Carolina Court of Appeals in this case.

Petitioner contends that the decision of the North Carolina Court of Appeals in this case is contrary to the decisions of the Courts of Appeal in *Nelson v. Knox*, 256 F.2d 312 (6th Cir., 1958); *Gaffney v. Silk*, 488 F.2d 1248 (1st Cir. 1973); and *Birnbaum v. Trussell*, 347 F.2d 86 (2nd Cir. 1965); as well as this Court's decision in *Harlowe v. Fitzgerald*, 457 U.S. 800 (1982). In fact, the decision of the North Carolina Court of Appeals is consistant with and in accordance with these decisions.

Nelson, Gaffney, Birnbaum, and *Harlowe* each stand for the proposition that municipal officers do not have complete immunity but, rather, have only a qualified privilege that acts as a defense against liability for harm caused by acts done by them in good faith in performance of their official duties as they understood it. Clearly, if a municipal officer violates a person's constitutional or federal rights, the doctrine of immunity is abrogated. *Birnbaum, supra.*

The North Carolina Court of Appeals, in affirming the Superior Court's decision, found that the acts of Respondents were legislatively authorized. (Petitioner's Appendix p. 68). Goldsboro City Ordinance §25-37 provides that "all water and sewer service lines shall be as specified in North Carolina Plumbing Code, Volume 2, and as approved by the Plumbing Inspector." The North Carolina State Plumbing Code, Volume 2, Chapter 8, §801.4 provides, in relevant part, that:

> A grease interceptor shall be installed at the waste line leading from sinks, drains or other fixtures in the following establishments when, in the opinion of the Plumbing Official, a hazard exists: restaurants, hotel, kitchens or bars . . . or other uses where grease can be introduced into the drainage systems in quantities that can affect line stoppage or hinder sewage disposal.

Furthermore, pursuant to North Carolina General Statutes §§160A-174 and 143-139, respectively, the City of Goldsboro has the right to prohibit or abate conditions detrimental to the health, safety or welfare of the City and to enforce the North Carolina Building Code.

The North Carolina Court of Appeals found that this legislation supported the actions of Respondents. It authorized Respondent's plumbing official to require the installation of a grease interceptor by Petitioner and, when necessary, abate the condition that was detrimental to the health and welfare of the citizens of Goldsboro. On March 31, 1993, after determining that Petitioner's restaurant was the source of the grease that had repeatedly clogged the City's sanitary sewer main, the Plumbing Inspector notified Petitioner and directed him to install the grease interceptor, as was required by the North Carolina Plumbing Code, *supra*. After repeated notifications over a period of nine months, and Petitioner's continuing refusal to install the grease interceptor, Respondents acted to protect the health and welfare of the citizens of Goldsboro and prohibit this detrimental situation by revoking Petitioner's temporary water permit. Shortly thereafter, Petitioner installed the grease interceptor and was granted a water permit, as provided by the relevant legislation.

Nelson, Gaffney, Birnbaum, and *Harlowe* each set forth the doctrine of qualified, good faith immunity. The North Carolina Court of Appeals found that Respondents' actions were not only in good faith but also legislatively authorized. Accordingly, the decision of the North Carolina Court of Appeals is not in contradiction with, but is, in fact, in accordance with the cases cited by Petitioner. Therefore, the Court should not grant certiorari on this basis.[2]

Petitioner also alleges that the North Carolina Court of Appeals erred in rejecting Petitioner's claim that Respondents' actions violated his constitutional right to due process. For Petitioner to prevail on the basis of lack of due process, Petitioner must first establish a property interest or an entitlement to the water services. Protected interests are normally not created by the Constitution; rather, they are created and defined by an independent source such as state statutes or rules entitling a citizen to certain benefits. *Board of Regents v. Roth,* 565 U.S. 564, 577 (1972); *Memphis Light, Gas and Water Div. v. Craft,* 436 U.S. 1 (1978). Under *Roth* and *Memphis Light,* the court will

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[2] Petitioner also contends that the decision of the North Carolina Court of Appeals in this case is contrary to this Court's decisions in *City of Ladue, et al. v. Gilleo,* 512 U.S. 129 (1994) (holding that a city ordinance banning all residential signs, but those falling within limited exceptions, violated resident's free speech rights), and *Youngstown Sheetmetal & Tubing v. Sawyer,* 343 U.S. 579 (1952) (holding that the President was without the authority to order the seizure of the plants of steel companies involved in a labor dispute). However, Respondents are unable to ascertain how these cases are relevant, let alone contrary, to the case at hand. In fact, Petitioner fails to cite any rulings contrary to the decision of the North Carolina Court of Appeals.

look to North Carolina law to determine whether a citizen has a substantive interest in water services. In the instant case, the North Carolina Court of Appeals found that *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990), was controlling and necessitated the conclusion that Petitioner had no property interest in the water service provided by Respondents and, therefore, could not claim a violation of his due process rights.

In *McNeill*, the appellants contended that the termination of water services without notice or opportunity for a hearing violated their right to due process. The North Carolina Supreme Court held that the water service furnished by the County did not rise to the level of "property" protected by due process requirements. *Id.*, 327 N.C. at 571. The Honorable Justice Meyer found that, while other statutes specifically authorize disconnections in certain situations, the language of N.C.G.S. §153A-283 states specifically that "[i]n no case may a county be held liable for damages for failure to furnish water or sewer services."[3]

The Court concluded that, in light of this statutory language, "a citizen of a county in North Carolina may not assert a claim of entitlement to water services." *Id.* Based upon the *McNeill* decision, the North Carolina Court of Appeals concluded that Petitioner had no property interest in Respondents' water services.

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[3] Similarly, Goldsboro City Ordinance §25-35, as authorized by N.C.G.S. §160A-312(b), provides, in pertinent part, "[n]o party interested shall have a claim for damage in consequence of [a permit to connect with the city water and sewer systems] being revoked or annulled."

The North Carolina Court of Appeals further stated that, even if Petitioner had a property interest in the water services, it could not discern any infringement on Petitioner's right to due process. The Court discussed the requirement set forth in *Memphis Light* that there be sufficient notice to afford reasonable assurance against "erroneous or arbitrary withholding of essential services." *Id.*, 436 U.S. at 18 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)). Citing *McNeill, supra,* the Court found that Petitioner was given numerous written and verbal notifications and directives of the required grease interceptor over a period of at least nine months prior to the termination of water services. Petitioner knew to whom, where, when and how he could discuss the Plumbing Code requirement of a grease interceptor and the potential for termination of the water services from the letters of March 31, 1993, December 3, 1993, and December 15, 1993 (Petitioner's Appendix pp. 82, 85, 90, respectively) as well as his many meetings in person with the inspectors.[4]

The Court held that this was "adequate protection from the arbitrary withholding of water services from his restaurant." Therefore, the Court held, assuming arguendo, that Petitioner had a property interest in the water services, Respondents did not violate his right to due process in light of the facts in the instant case.

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[4] Although the North Carolina Court of Appeals did not note this, Petitioner states in his Statement of Fact that he even participated in the City's administrative procedure by filing for a variance in December 1993, which was denied by Respondents' inspector. (Petitioner's Appendix p. 18).

Petitioner contends that this ruling is in contradiction with this Court's decision in *Oyama v. California*, 332 U.S. 633 (1948). However, in *Oyama*, this Court held that the California Alien Land Law, as applied to a minor American citizen whose parents were ineligible for naturalization, discriminated on the basis of racial descent and deprived the minor of equal protection of the laws. The holding of the North Carolina Court of Appeals in this case is in no way contrary to this Court's decision in *Oyama*.[5]

Finally, Petitioner states that this Court has held that when "water is cut off and there is a refusal to turn it back on while the petitioner's license is still in force and no exigencies such as fire or shortage exist, but is used merely to abate an ordinance violation without the limits of constitutional guarantees" Article VI of the Constitution is violated. (Petition for Writ, pp. 18-19, citing *Dohany v. Rogers*, 281 U.S. 362 (1930); *Turpin v. Lemon*, 187 U.S. 51 (1902); and *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994)). However, this is not correct and is a clear misstatement of this Court's rulings in these cases. The cited cases resolve issues of eminent domain and are not contrary to the holding of the North Carolina Court of Appeals in the instant case.

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[5] Petitioner also contends that the Court's ruling violated his "entitlement to an American Dream." (Petition for Writ, p. 23). Petitioner fails to cite any authority for this "entitlement" and Respondents have been unable to ascertain any state or federal statutory or case law to support this contention.

CONCLUSION

The decision of the North Carolina Court of Appeals does not constitute new law nor does it conflict with decisions of other state courts of last resort, the United States Courts of Appeal, or the United States Supreme Court. Accordingly, Respondents respectfully request that the Court deny the petition for a writ of certiorari.

This the 19th day of August, 1996.

Respectfully submitted,

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APPENDIX

FILED: February 1, 1995, 11:01 a.m., Wayne County Clerk of Superior Court

NORTH CAROLINA
WAYNE COUNTY

TSENG FU LIN d/b/a ORIENTAL JADE RESTAURANT,
Plaintiff,

vs.

CITY OF GOLDSBORO, FLOYD M. McKEEL, agent, and CHARLES R. SOUTHERLAND, agent,
Defendants.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 94 CVS 860

ORDER

This Order came on for hearing before the undersigned Judge upon Defendants' written Motion for Summary Judgment, and the Court having considered the pleadings before the Court and heard oral argument of the parties, it appears that there are no genuine issues of material fact and that the Defendants are entitled to Summary Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that Defendants' Motion for Summary Judgment by and is hereby GRANTED.

This the 30th day of January, 1995.

/s/ Honorable Russell J. Lanier
Judge Presiding

FILED: June 27, 1994, 2:39 p.m., Wayne County Clerk of Superior Court

NORTH CAROLINA WAYNE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO.: 94 CVS 860
TSENG FU LIN d/b/a ORIENTAL JADE RESTAURANT, Plaintiff, vs. CITY OF GOLDSBORO, FLOYD M. McKEEL, agent, and CHARLES R. SOUTHERLAND, agent, Defendants.	**ANSWER AND COUNTERCLAIM**

MOTION TO DISMISS

Now come the Defendants, by and through their attorney, L. Ashley Smith, and move the Court pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure to dismiss the Complaint of the Plaintiff for failure to state a claim upon which relief can be granted.

FIRST DEFENSE

GOVERNMENTAL IMMUNITY

Defendant, City of Goldsboro, pleads the doctrine of governmental immunity in bar of Plaintiff's claims for damages.

SECOND DEFENSE
QUALIFIED IMMUNITY

Plaintiff has brought this action against Defendant Municipality alleging that the Defendant Municipality ordered the closing of Plaintiff's business without providing the Plaintiff with notice or opportunity to be heard. Plaintiff complains of actions taken by Defendants McKeel and Southerland while acting in their official capacity as employees of Defendant Municipality.

In carrying out the complained of actions, the Defendants McKeel and Southerland were acting in good faith and within the scope of their authority. In so acting, the Defendants McKeel and Southerland did not breach any duty to Plaintiff which was clearly established as a matter of law at the time of the complained of incident. Thus, Defendants are entitled to qualified, good faith immunity from this suit.

THIRD DEFENSE
RESPONDING TO SPECIFIC ALLEGATIONS OF THE COMPLAINT

The Defendants, answering the Complaint of the Plaintiff, allege and say as follows:

1. That the allegations contained in paragraphs 1, 4, and 7 of the Complaint are admitted.

2. That as to the allegations contained in paragraphs 2 and 3 of the Complaint, the Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations in said paragraphs, and the same are, therefore, denied.

3. That as to the allegations contained in paragraph 6 of the Complaint, it is admitted that the Defendant, Floyd M. McKeel was an agent of the Defendant, City of Goldsboro, at the time of the events allegedly giving rise to the Complaint. Except as expressly admitted herein, the remaining allegations in paragraph 6 of the Complaint are denied.

4. That as to the allegations contained in paragraph 8 of the Complaint, it is admitted that the Defendant, Floyd M. McKeel, authorized the termination of water service to 2102 North Highway 117 By-Pass, Goldsboro, North Carolina, on December 15, 1993. Except as expressly admitted herein, the remaining allegations in paragraph 8 of the Complaint are denied.

5. The allegations contained in paragraphs 5, 9 and 10 of the Complaint are denied.

FOURTH DEFENSE

By way of a further and affirmative defense, the Defendants allege and says as follows:

6. The right to prohibit or abate conditions detrimental to the health, safety or welfare of the Defendant City has been delegated to Defendant City by G.S. § 160A-174.

7. The right to enforce the North Carolina Building Code has been delegated to Defendant City by G.S. § 143-139.

8. Goldsboro City Ordinance § 25.37 provides that "all water and sewer service lines shall be as specified in

North Carolina Plumbing Code, Volume 2, and as approved by the Plumbing Inspector."

9. The North Carolina State Plumbing Code, Volume 2, Chapter 8, § 801-4 provides, in part, that:

> A grease interceptor shall be installed at the waste line leading from sinks, drains or other fixtures in the following establishments when, in the opinion of the Plumbing Official, a hazard exists: restaurants, hotel kitchens or bars, factory cafeterias or restaurants, clubs, or other uses where grease can be introduced into the drainage systems in quantities that can affect line stoppage or hinder sewage disposal.

10. On both September 20, 1991, and March 24, 1993, City maintenance crews cleaned out a large section of sanitary sewer pipe where Plaintiff's building connected to the sanitary sewer main. Said sanitary sewer main was clogged with grease and had contaminated the plumbing of citizens connected to the sewer further down-line. As Plaintiff's restaurant was the first customer connected to the sanitary sewer main, the origin of the grease can only be attributed to Plaintiff's facility.

11. By letter dated March 31, 1993, John N. Hales, Plumbing/Mechanical Inspector for the City of Goldsboro, notified Oriental Jade Restaurant that the City was requiring Plaintiff to install a grease trap of sufficient size and strength to protect the City's sanitary sewer main. A copy of said letter is attached as hereto Exhibit "A" and incorporated herein by reference.

12. That John N. Hales, Plumbing/Mechanical Inspector for the City of Goldsboro, verbally advised the Plaintiff, Tseng Fu Lin, on numerous occasions between

March 31, 1993, and December 15, 1993, that a grease interceptor would have to be installed in the restaurant as required by the North Carolina State Plumbing Code.

13. That despite receipt of Defendant's letter of March 31, 1993, and the numerous oral warnings, Plaintiff refused and still refuses to install a grease interceptor in the restaurant at 2102 North Highway 117 By-Pass, Goldsboro, North Carolina, in order to bring the building into compliance with City Ordinances and the North Carolina State Building Code.

14. That some time after March 31, 1993, Oriental Jade Restaurant closed in order to make repairs caused by fire. Temporary water service was authorized to the premises so that Plaintiff's contractor could perform the needed repairs.

15. By certified letter, return receipt requested, dated December 3, 1993, from Floyd M. McKeel, Chief Inspector of the City of Goldsboro, Plaintiff was notified that water service to 2102 North Highway 117 By-Pass, Goldsboro, North Carolina, would not be authorized on a permanent basis until such time as a grease intercepter [sic] was installed pursuant to the North Carolina State Building Code and City Ordinances. A copy of said letter and the return receipt signed by Plaintiff are attached hereto as Exhibit "B" and incorporated herein by reference.

16. Plaintiff having failed to comply with the reasonable requests and notifications from the Defendant City over a period of nine (9) months, Plaintiff's permit to connect with City water was revoked pursuant to Goldsboro City Ordinance § 25-35 on December 15, 1993. A

letter from Floyd M. McKeel, Chief Inspector, to the Plaintiff dated December 15, 1993, informing Plaintiff of this action, is attached hereto as Exhibit "C" and incorporated herein by reference.

17. That the Defendant City and its agents were at all times acting properly and within the scope of their authority as established by City Ordinance and State Statutes.

18. That notice sufficient to advise Plaintiff to bring his property into compliance with City Ordinances and the State Building Code was provided, and Plaintiff's right to due process has, in no way, been violated.

FOURTH DEFENSE

19. As a further defense, and complete or partial bar to any claim Plaintiff may have for damages, Defendant asserts § 25-35 of the Goldsboro City Ordinances which provides that "no party interested shall have a claim for damage in consequence of [its City Water] permit being revoked or annulled."

COUNTER CLAIM

MOTION FOR MANDATORY INJUNCTION AND ORDER OF ABATEMENT

20. Paragraphs 1 through 19 above are re-alleged and incorporated herein by reference as if fully set forth.

21. That Plaintiff is in willful violation of Goldsboro City Ordinance and the State Building Code in that he refused and still refuses to install a grease interceptor at

2102 North Highway 117 By-Pass, Goldsboro, North Carolina.

22. That the discharge of water by a restaurant business at 2102 North Highway 117 By-Pass, Goldsboro, North Carolina, into the City sewer system without the installation of a grease interceptor would be detrimental to the health, safety and welfare of the citizens of Defendant Municipality.

23. That, if the Plaintiff wishes to receive a business license and water permit to operate a restaurant business at the location in question, the City is in need of a mandatory injunction ordering Plaintiff to install a grease interceptor to bring the property into compliance with the North Carolina State Building Code and Goldsboro City Ordinances.

WHEREFORE, the Defendants pray the Court as follows:

1. For an Order dismissing this action as to Defendants McKeel and Southerland;

2. That the relief requested in Plaintiff's Complaint be denied, and that he have and recover nothing by way of damages, compensatory or punitive, from the Defendants;

3. That the Court enter an Order of abatement and mandatory injunction requiring Plaintiff to install a grease interceptor in compliance with Goldsboro City Ordinances and the North Carolina State Building Code in the restaurant facility at 2102 North Highway 117 By-Pass, Goldsboro, North Carolina, prior to the issuance of

any permit to connect with City Water or to operate a business at said location, all at his expense;

4. That Defendants have and recover the costs of this action, including reasonable attorney's fees, as may be allowed by law; and

5. For such other and further relief as to the Court seems just and proper.

This the 27th day of June, 1994.

EVERETT, WOMBLE, FINAN
& RIDDLE

/s/ L. Ashley Smith
State Bar No. 19273
Attorney for Defendants
P.O. Drawer 10809
Goldsboro, NC 27532-0809
(919) 778-6707

Exhibit "A"

City of Goldsboro

P. O. Drawer A
North Carolina
27533-9701

(919) 735-6121

March 31, 1993

Certification No. P364 761820

Oriental Jade Restaurant
2102 N. Highway 117 Bypass
Goldsboro, NC 27530

Dear Sir(s):

Thank you for the time you took to discuss the grease problem at your restaurant. As I told you at the time of our discussion, this is the second time in two years that our sanitation department has had to clean out a large section of sewer pipe where your building connects to our sewer main.

I do not know how the grease is getting through, but the fact is that it is getting through. Therefore, I must insist that you obtain a licensed plumber to install a grease trap that will be of sufficient size and gallon per minute to protect our sewer. The fixtures that will need to be put on the grease trap must include: the dishwasher, the pots and pan sink, any floor drains that might receive wash down from the cooking area and the can wash.

As is customary, we will allow you thirty (30) days from the date of receipt of this letter to get the equipment installed. It is hoped that you will comply with this letter and further action can be avoided.

If I can be of further assistance, please do not hesitate to contact me by calling 580-4389. My office hours are from 8:00 a.m. – 9:30 a.m. and from 4:00 p.m. – 5:00 p.m. Monday through Friday.

Yours truly,

/s/ John N. Hales
Plumbing/Mechanical Inspector

JNH:jg
cc: Floyd McKeel, Chief Inspector

Exhibit "B"

City of Goldsboro
P. O. Drawer A
North Carolina
27533-9701

December 3, 1993

(919) 735-6121

Certification No. P375 015124

Mr. Tseng Fu Lin
Oriental Jade Restaurant
2102 N. Highway 117 Bypass
Goldsboro, NC 27530

Dear Mr. Lin:

The City Manager has asked that I write you concerning the reasons the Inspections Division of the City of Goldsboro has required that a grease interceptor be installed at your restaurant located at 2102 North Highway 117 Bypass.

I refer you to a certified letter dated March 31, 1993 from John Hales, Plumbing/Mechanical Inspector for the City of Goldsboro, a copy of which is attached hereto. I believe this letter fully explains the Inspections Division's position concerning installation of a grease interceptor.

If I may summarize, the City's Maintenance Division has been called to your restaurant on two occasions in order to clean out a section of sanitary pipe which was clogged with grease. Since your restaurant is the first customer connected to the sanitary sewer main, the origin of the grease can only be attributed to your facility. In March, 1993, the Inspections Division requested that a licensed plumber install a grease interceptor of sufficient size and gallons per minute in order to protect the City of Goldsboro's sanitary sewer system. You were subsequently granted 30 days from the date of receipt of the March 31, 1993 letter in order to comply with this directive.

As of this date, a grease interceptor has not been installed at the Oriental Jade Restaurant. The City of Goldsboro has the authority under the North Carolina State Plumbing Code to mandate this requirement. I refer to Chapter 8, Section 801-4 entitled "Grease Interceptors" of the State Plumbing Code which states, in part, that:

> "A grease interceptor shall be installed in the waste line leading from sinks, drains or other fixtures in the following establishments when, in the opinion of the Plumbing Official, a hazard exists: restaurants, hotel kitchens or bars, factory cafeterias or restaurants, clubs, or other uses where grease can be introduced into the

drainage system in quantities that can affect line stoppage or hinder sewage disposal."

The City of Goldsboro has performed a considerable amount of maintenance on the sanitary sewer line coming into your establishment. I must advise you that, until such time a grease interceptor is installed at this location in compliance with the State Plumbing Code, authorization will not be forthcoming for permission to connect to water, sanitary sewer or electrical service. The system that currently exists at this restaurant is not achieving its intended purpose. A grease interceptor must be installed in order to meet City sanitary sewer standards.

I am asking for your cooperation in this matter. If you have any questions or if I can be of assistance, you may contact me at 580-4346.

Yours truly,

/s/ Floyd McKeel
Chief Inspector

FM/RMS/ssj

Attachment

Exhibit "C"

City of Goldsboro
P. O. Drawer A
North Carolina
27533-9701

December 15, 1993
(919) 735-6121

Mr. Tseng Fu Lin
2102 N. Highway 117 Bypass
Goldsboro, NC 27530

Dear Mr. Lin:

This letter is to advise you that failure on your part to install a grease trap at your restaurant, known as Oriental Jade, located at the above mentioned address, by 12:00 p.m. Thursday, December 16, 1993, this office will have no alternative but to have your water service disconnected.

You have been given ample opportunity to meet the requirements of the State Building Code and the City Ordinance requiring you to have a grease trap installed. The first notice was mailed to you in March 31, 1993. You have not, as of this date, complied with our request. Therefore, failure on your part to comply with this notice will result in the water service being terminated.

Asking for your cooperation in this matter. If you have any questions, please contact me by calling 580-4346.

Sincerely,

/s/ Floyd McKeel

FM:

/s/ Acknowledgment of Receival
Mr. Tseng Lin or Authorized Representative

/s/ R. D. Roscoe
Officer, Goldsboro Police Department

December 15, 1993, 11:12 a.m.
Date and Time of Delivery

FILED: November 30, 1994, 3:06 p.m., Wayne County Clerk of Superior Court

NORTH CAROLINA
WAYNE COUNTY

TSENG FU LIN d/b/a ORIENTAL JADE RESTAURANT,
Plaintiff,

vs.

CITY OF GOLDSBORO, FLOYD M. McKEEL, agent, and CHARLES R. SOUTHERLAND, agent
Defendants.

IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
FILE NO.: 94 CVS 860

AFFIDAVIT OF JOHN N. HALES

NOW COMES, John N. Hales, being duly sworn, depose and say:

1. That I am over eighteen years of age, and I am competent to make the statements contained in this Affidavit.

2. Except for matters and facts which are stated expressly upon the bases of information which I believe is true, the statements and facts contained in this Affidavit are based upon my own personal knowledge and experience.

3. That I am employed by the City of Goldsboro as the Plumbing/Mechanical Inspector.

4. That the Plaintiff, Tseng Fu Lin, has complied with the City of Goldsboro's request to install a grease interceptor at 2102 North Highway 117 Bypass, Goldsboro, North Carolina, by installing a grease interceptor in July, 1994.

5. Further this affiant sayeth not.

This the 30th day of November, 1994.

/s/ John N. Hales

NORTH CAROLINA

WAYNE COUNTY

I, Cathleen D. Fink, a Notary Public in and for the aforesaid State and County, do hereby certify that John N. Hales personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

WITNESS my hand and notarial seal, this the 30th day of November, 1994.

/s/ Cathleen D. Fink
Notary Public

My Commission Expires: June 3, 1998

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the document in the above entitled action upon all other parties to this cause by

_____ Hand delivering a copy thereof to the attorney for each said party.

__X__ Depositing a copy hereof, postage pre-paid in the United States Mail, properly addressed to the attorney for each said party.

This 1st day of December, 1994.

/s/ L. Ashley Smith
For EVERETT, WOMBLE,
FINAN & RIDDLE

FILED: January 11, 1996, 11:28 a.m., Office of the Clerk, Supreme Court of North Carolina
No. 5P96 EIGHT-B DISTRICT

NORTH CAROLINA SUPREME COURT

****

TSENG FU LIN, d/b/a ORIENTAL JADE RESTAURANT, Plaintiff/Petitioner, v. CITY OF GOLDSBORO, FLOYD McKEEL, Agent, and CHARLES R. SOUTHERLAND, Defendants/Respondents.	COA 95-657 From Wayne County No. 94 CVS 860

RESPONSE TO PETITION FOR DISCRETIONARY REVIEW

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Respondents, the City of Goldsboro, Floyd McKeel, agent, and Charles R. Southerland, pursuant to Rule 15(d) of the North Carolina Rules of Appellate Procedure and N.C.G.S. § 7A-31, respectfully submit this response to Petitioner's Petition for Discretionary Review of the decision of the North Carolina Court of Appeals dated December 19, 1995, Case No. COA95-657, affirming the trial court's grant of summary judgment for Respondents.

Petitioner contends that review should be granted because this cause involves legal principals [sic] of major

significance to the jurisprudence of the State and Nation, and the decision of the Court of Appeals appears likely to be in conflict with decision of the North Carolina Supreme Court, United States Supreme Court, and North Carolina Court of Appeals.

In fact, the decision of the Court of Appeals affirming the trial court's grant of summary judgment for Respondents on the grounds of governmental immunity is firmly supported by the following legal authority:

1. *Metz v. Asheville*, 150 N.C. 748, 64 S.E. 881 (1909)

2. *Lonon v. Talbert*, 103 N.C. App. 686, 691, 407 S.E.2d 276, 280 (1991)

3. North Carolina General Statutes Sections 160A-174, 143-139

4. Goldsboro City Ordinance Section [sic] 25-37

5. North Carolina Plumbing Code, Volume 2, Chapter 8, Section 801.4

The Court of Appeals also rejected Petitioner's contention that the City of Goldsboro Ordinance permitting the actions taken by Respondents' agents violated his constitutional right to due process. This conclusion is firmly supported and controlled by your holding in *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

Finally, Petitioner's contention in his Petition that Respondents' actions constituted an "inverse condemnation without due process of law and just compensation" was not made to nor considered by the Court of Appeals

and should not be considered by this Court in determining whether to grant certiorari.

Accordingly, Respondents respectfully request that this Court deny Petitioner's Petition for Discretionary Review.

Respectfully submitted this the 10th day of January, 1995.

EVERETT, WOMBLE, FINAN & RIDDLE

/s/ W. Harrell Everett, Jr.
Attorney for Respondents
P. O. Drawer 10809
Goldsboro, NC 27532-0809
(919) 778-6707
N.C. State Bar No. 1388

/s/ Stacey L. Fuller
Attorney for Respondents
P. O. Drawer 10809
Goldsboro, NC 27532-0809
(919) 778-6707
N.C. State Bar No. 21752

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of this Response to Petition for Discretionary Review has this day been served upon the Plaintiff-Petitioner by mailing a copy of the same to his Counsel of Record, Robert E. Fuller, Jr., sent in the United States mail, postpaid to his address, P.O. Box 1121, Goldsboro, NC 27533-1121, this the 10th day of January, 1996.

EVERETT, WOMBLE,
FINAN & RIDDLE

/s/ Stacey L. Fuller
Attorney for Respondents
P. O. Drawer 10809
Goldsboro, NC 27532-0809
(919) 778-6707
N.C. State Bar No.: 21752

Goldsboro Code of Ordinances § 25-35. Permit revocation.

All permits to connect with the city water and sewer systems shall be given upon the condition that the city engineer may at any time, before the completion of the connection, revoke and annul the permit when the work is not being properly executed. No party interested shall have a claim for damage in consequence of such permit being revoked or annulled. (Ord. No. 1982-47, § 2, 10-4-82)

Goldsboro Code of Ordinances § 25-35

Goldsboro Code of Ordinances § 25-37. City engineer to grant permit, cause service lines to be laid; ownership of service lines; revocation of permit, etc.

The city engineer may grant such permit and shall cause suitable water service lines to be laid from the main water line to and including the curb stop, which shall be located near the abutting property line, and be provided with a suitable meter box. Ownership of the service line from main line to meter box lines with the property owners. The work of furnishing and laying the line up to and including the curb stop shall be performed by the city maintenance superintendent and paid for in advance by the property owner, including replacement tap. The applicant shall furnish and lay the balance of the water service line at his own expense, subject, however, to the supervision and director of the plumbing inspector. Such water service lines shall be laid to the depth of the bottom of the main water line, unless otherwise permitted by the plumbing inspector, and shall, when required by the city, be covered with at least eighteen (18) inches of some approved material to protect the water service line from frost. All water and sewer service lines shall be as specified in the North Carolina Plumbing Code, Volume II, and as approved by the plumbing inspector. Backflow prevention devices shall be installed where directed by the plumbing inspector. If the applicant, in putting in any service lines from the property line to his structure, disregards the director of the city engineer, maintenance superintendent or plumbing inspector in any particular, the permit granted for the use of water

may be revoked by the city engineer and the tap fee forfeited to the city. (Ord. No. 1982-47, § 2, 10-4-82)

Goldsboro Code of Ordinances § 25-37.

N.C.G.S. § 143-139 *Enforcement of Building Code*

(a) Procedural Requirements. – Subject to the provisions set forth herein, the Building Code Council shall adopt such procedural requirements in the North Carolina State Building Code as shall appear reasonably necessary for adequate enforcement of the Code while safeguarding the rights of persons subject to the Code.

(b) General Building Regulations. – The Insurance Commissioner shall have general supervision, through the Division of Engineering of the Department of Insurance of the administration and enforcement of all sections of the North Carolina State Building code pertaining to plumbing, electrical systems, general building restrictions and regulations, heating and air conditioning, fire protection, and the construction of buildings generally, except those sections of the Code, the enforcement of which is specifically allocated to other agencies by subsections (c) and (d) below. The Insurance Commissioner by means of the Division of Engineering, shall exercise his duties in the enforcement of the North Carolina State Building Code (including local building codes which have superseded the State Building Code in a particular political subdivision pursuant to G.S. 143-138(e)) in cooperation with local officials and local inspectors duly appointed by the governing body of any municipality or board of county commissioners pursuant to Part 5 of Article 19 of Chapter 160A of the General Statutes or Part 4 of Article 18 of Chapter 153A of the General Statutes, or other applicable statutory authority.

(b1) Remedies. – In case any building or structure is maintained, erected, constructed, or reconstructed or its

purpose altered, so that it becomes in violation of this Article or of the North Carolina State Building Code, either the local enforcement officer or the State Commissioner of Insurance or other State official with responsibility under this section may, in addition to other remedies, institute any appropriate action or proceeding to: (i) prevent the unlawful maintenance, erection, construction, or reconstruction or alteration of purpose, or overcrowding, (ii) restrain, correct, or abate the violation, or (iii) prevent the occupancy or use of the building, structure, or land until the violation is corrected. In addition to the civil remedies set out in G.S. 160A-175 and G.S. 153A-123, a county, city, or other political subdivision authorized to enforce the North Carolina Building Code within its jurisdiction may, for the purposes states in (i) through (iii) of this subsection, levy a civil penalty for violation of the fire prevention code of the North Carolina State Building Code, which penalty may be recovered in a civil action in the nature of debt if the offender does not pay the penalty within a prescribed period to time after the offender has been cited for the violation. If the Commissioner or other State official institutes an action or proceeding under this section, a county, city or other political subdivision may not institute a civil action under this section based upon the same violation. Appeals from the imposition of any remedy set forth herein, including the imposition of a civil penalty by a county, city, or other political subdivision, shall be as provided in G.S. 160A-434.

(c) Boilers. – The Bureau of Boiler Inspection of the Department of Labor shall have general supervision of the administration and enforcement of those sections of

the North Carolina State Building Code which pertain to boilers of the types enumerated in Article 7 of Chapter 95 of the General Statutes.

(d) Elevators. – The Department of Labor shall have general supervision of the administration and enforcement of those sections of the North Carolina State Building Code which pertain to elevators, moving stairways, and amusement devices such as merry-go-rounds, roller coasters, Ferris wheels, etc. (1957, c. 1138; 1963, c. 811; 1989, c. 681, s. 11; 1993, c. 329, s. 2.)

N.C.G.S. § 143-139

N.C.G.S. § 160A-174. *General ordinance – making power.*

(a) A city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances.

(b) A city ordinance shall be consistent with the Constitution and laws of North Carolina and the United States. An ordinance is not consistent with State or federal laws when:

(1) The ordinance infringes a liberty guaranteed to the people by the State or federal Constitution;

(2) The ordinance makes unlawful an act, omission or condition which is expressly made lawful by State or federal law;

(3) The ordinance makes lawful an act, omission, or condition which is expressly made unlawful by State or federal law;

(4) The ordinance purports to regulate a subject that cites [sic] are expressly forbidden to regulate by State or federal law;

(5) The ordinance purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation;

(6) The elements of an offense defined by a city ordinance are identical to the elements of an offense defined by State or federal law.

The fact that a State or federal law, standing along, [sic] makes a given act, omission, or condition unlawful shall not preclude city ordinances requiring a higher standard of conduct or condition. (1971, c. 698, s. 1.)

N.C.G.S. § 160A-174

N.C.G.S. § 160A-311. *Public enterprise defined.*

As used in this Article, the term "public enterprise" includes:

(1) Electric power generation, transmission, and distribution systems;

(2) Water supply and distribution systems;

(3) Wastewater collection, treatment, and disposal systems of all types, including septic tank systems or other on-site collection or disposal facilities or systems;

(4) Gas production, storage, transmission, and distribution systems, where systems shall also include the purchase and/or lease of natural gas fields and natural gas reserves, the purchase of natural gas supplies, and the surveying, drilling and any other activities related to the exploration for natural gas, whether within the State or without;

(5) Public transportation systems;

(6) Solid waste collection and disposal systems and facilities;

(7) Cable television systems;

(8) Off-street parking facilities and systems;

(9) Airports;

(10) Structural and natural stormwater and drainage systems of all types. (1971, c. 698, s. 1; 1975, c. 549, s. 2; c. 821, s. 3; 1977, c. 514, s. 2; 1979, c. 619, s. 2; 1989, c. 643, s. 5; 1991 (Reg. Sess., 1992), c. 944, s. 14.)

N.C.G.S. § 160A-311

N.C.G.S. § 160A-312. *Authority to operate public enterprises.*

(a) A city shall have authority to acquire, construct, establish, enlarge, improve, maintain, own, operate, and contract for the operation of any or all of the public enterprises as defined in this Article to furnish services to the city and its citizens. Subject to Part 2 of this Article, a city may acquire, construct, establish, enlarge, improve, maintain, own, and operate any public enterprise outside its corporate limits, within reasonable limitations, but in no case shall a city by [sic] held liable for damages to those outside the corporate limits for failure to furnish any public enterprise service.

(b) A city shall have full authority to protect and regulate any public enterprise system belonging to or operated by it by adequate and reasonable rules. The rules shall be adopted by ordinance, shall apply to the public enterprise system both within and outside the corporate limits of the city, and may be enforced with the remedies available under any provision of law.

(c) A city may operate that part of a gas system involving the purchase and/or lease or natural gas fields, natural gas reserves and natural gas supplies and the surveying, drilling or any other activities related to the exploration for natural gas, in a partnership or joint venture arrangement with natural gas utilities and private enterprise. (1971, c. 698, s. 1; 1973, c. 426, s. 51; 1975, c. 821, s. 5; 1979, 2nd Sess., c. 1247, s. 29; 1991 (Reg. Sess., 1992), c. 836, s. 1.)

N.C.G.S. § 160A-312

N.C.G.S. § 160A-411. *Inspection Department.*

Every city in the State is hereby authorized to create an inspection department, and may appoint one or more inspectors who may be given the titles of building inspector, electrical inspector, plumbing inspector, housing inspector, zoning inspector, heating and air-conditioning inspector, five [sic] prevention inspector, or deputy or assistant inspector, or such other titles as may be generally descriptive of the duties assigned. The department may be headed by a superintendent or director of inspections. Every city shall perform the duties and responsibilities set forth in G.S. 160A-412 either by: (I) creating its own inspection department; (ii) creating a joint inspection department in cooperation with one or more other units of local government, pursuant to G.S. 106A-413 or Part 1 of Article 20 of this Chapter; (iii) contracting with another unit of local government for the provision of inspection services pursuant to Part 1 of Article 20 of this Chapter; or (iv) arranging for the county in which it is located to perform inspection services within the city's jurisdiction as authorized by G.S. 160A-413 and G.S. 160A-360. Such action shall be taken no later than the applicable date in the schedule below, according to the city's population as published in the 1970 United States Census:

Cities over 75,000 population – July 1, 1979

Cities between 50,001 and 75,000 – July 1, 1981

Cities between 25,001 and 50,000 – July 1, 1983

Cities 25,000 and under – July 1, 1985.

In the event that any city shall fail to provide inspection services by the date specified above or shall cease to provide such services at any time thereafter, the Commissioner of Insurance shall arrange for the provision of such services, either through personnel employed by his department or through an arrangement with other units of government. In either event, the Commissioner shall have any [sic] may exercise within the city's jurisdiction all powers made available to the city council with respect to building inspection under Part 5 of Article 19, and Part 1 of Article 20 of this Chapter. Whenever the Commissioner has intervened in this manner, the city may assume provision of inspection services only after giving the Commissioner two years' written notice of its intention to do so; provided, however, that the Commissioner may waive this requirement or permit assumption at an earlier date if he finds that such earlier assumption will not unduly interfere with arrangements he has made for the provision of those services. (1969, c. 1065, s. 1; 1971, c. 698, s. 1; 1977, c. 531, s. 5.)

N.C.G.S. § 160A-411

North Carolina State Plumbing Code (1991)

Chapter 8: Interceptors, Separators and Backwater Valves

§ 801.1 When Required

Interceptors or separators shall be provided when, in the opinion of the Plumbing Official, they are necessary for the proper handling of wastes containing ingredients harmful to the building drainage system, the public sewer, or sewage treatment plant or processes.

§ 801.4 Grease Interceptors

A grease interceptor shall be installed in the waste line leading from sinks, drains or other fixtures in the following establishments when, in the opinion of the Plumbing Official, a hazard exists; restaurants, hotel kitchens or bars, factory cafeterias or restaurants, clubs, or other uses where grease can be introduced into the drainage system in quantities that can affect line stoppage or hinder sewage disposal.

North Carolina Plumbing Code, Volume 2, Ch. 8, §§ 801.1, 801.4 (1991)